

Gregory J. Kuykendall, Bar # 012508
Amy P. Knight, Bar # 031374
KUYKENDALL & ASSOCIATES
531 S Convent Avenue
Tucson, AZ 85701
(520) 792-8033
greg@kuykendall-law.com
amyknight@kuykendall-law.com

Pro Bono Attorneys for Defendant Scott Daniel Warren

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America,)	
)	No. 17-mj-00341
Plaintiff,)	
)	MOTION TO COMPEL
vs.)	DISCOVERY RESPONSES
)	
SCOTT DANIEL WARREN,)	
)	
Defendant.)	
_____)	

The defendant, Dr. Scott Warren, by and through his undersigned attorneys, hereby respectfully requests this Court, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, to order the government to provide adequate responses to Defendant's Fourth Discovery Requests. This motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

1 Dr. Scott Warren stands charged in a two-count information alleging
2 operation of a motor vehicle in a wilderness area and abandonment of property, both
3 alleged to have occurred in the Cabeza Prieta National Wildlife Refuge, a remote
4 desert area that extends to the US-Mexico border. Dr. Warren volunteers with the
5 humanitarian organization No More Deaths, which works to end death and suffering
6 on the border by, among other things, conducting search and rescue/recovery
7 operations, and placing emergency water and food in the desert for imperiled
8 travelers. The humanitarian crisis they address is well-documented. According to the
9 nonprofit Humane Borders, which works closely with the Pima County Office of the
10 Medical Examiner to track and report migrant deaths, in Arizona alone, 169 sets of
11 human remains were recovered from the desert in the border region in 2016, 128 in
12 2017, and 127 in 2018; the vast majority are unidentified. *See* Arizona OpenGIS
13 Initiative for Deceased Migrants, <http://www.humaneborders.info/app/map.asp>.
14 And these are only the known deaths. Migrants also die without being recorded;
15 Border Patrol agents and humanitarian groups continue to find human remains in
16 remote desert areas, some of which have been there a long time.

22 On January 18, 2019, Dr. Warren submitted to the government Defendant's
23 Fourth Discovery Requests, seeking a very specific, circumscribed set of
24 information: "Any and all data, reports, correspondence, or other documents
25 concerning the activation of the rescue beacons in Cabeza Prieta and any response,
26 or lack thereof, including response times and results, for the years 2014-2018." *See*

1 Exhibit 1. The government responded on January 21, 2019: “As it stands right now,
2 the disclosure request is overly broad, not related to a legal defense, based on
3 speculation, irrelevant and/or does not otherwise implicate the government’s
4 disclosure obligations. Therefore, the government will not disclose the requested
5 items, if they exist, at this time.” *See* Exhibit 2.
6

7 **ARGUMENT**

8 **I. The Rule 16 “Materiality” Standard**

9
10 Federal Rule of Criminal Procedure 16(a)(1)(E) requires that, upon a defendant’s
11 request, the government must “disclose any documents or other objects within its
12 possession, custody or control” that are “material to preparing the defense.” Notably,
13 this standard does *not* require that the discovery be related to a particular identified
14 affirmative defense, or to a defense that has already been asserted in pretrial
15 litigation. Sometimes, the defense team may not be able to fully identify every
16 possible angle for defending the case without some additional disclosure; the rule
17 thus provides for disclosure broadly material to “preparing the defense.” Nor should
18 a defendant be forced to specify the precise details of the defense he is considering
19 simply to obtain material necessary for evaluating the prospects of that defense; to
20 do so would be to condition his access to discovery on a willingness to provide the
21 prosecution with a detailed road map of his case.
22

23
24 “[T]o obtain discovery under Rule 16, a defendant must make a prima facie
25 showing of materiality.” *United States v. Zone*, 403 F.3d 1101, 1107 (9th Cir. 2005)
26
27
28

1 (quoting *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990)). This “low
2 threshold” is satisfied if the information requested would “help[]” the defendant
3 prepare a defense. *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir.
4 2013). Evidence is discoverable under Rule 16 “even if the evidence is not
5 admissible so long as it is reasonably likely to lead to admissible evidence.” *United*
6 *States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009) (internal quotation marks
7 omitted).

10 **II. The Information Sought Is Clearly Material to “Preparing the** 11 **Defense” in Dr. Warren’s Case.**

12 A core issue in this case has always been whether the placement of emergency
13 supplies in the refuge, including in remote areas not accessible by public road, is a
14 necessary response to a real need. As the Court may recall from the recent trial on
15 the same two charges that Dr. Warren is facing (plus an additional charge not
16 leveled against Dr. Warren), Case No. 17-mj-339, the defense litigated a number of
17 possible defenses in pretrial motions, including selective enforcement, violation of
18 international law, and the Religious Freedom Restoration Act; their Notice of
19 Defenses, filed after the conclusion of all that litigation approximately one month
20 before trial began, included the additional defense of necessity. *See* Exhibit 3. The
21 necessity defense was then asserted at trial, where federal officers gave sworn
22 testimony about the efficacy of the beacons, including Juliette Fernández, who is
23 the U.S. Fish and Wildlife Service Refuge Supervisor for all of Arizona and New
24
25
26
27
28

1 Mexico. In addition, the prosecutors repeatedly invoked the efficacy of rescue
2 beacons to explain why water drops were not necessary.

3
4 Of course, a defendant need not show that a defense would be successful to
5 trigger the government's Rule 16 obligations; indeed, that would be a classic
6 Catch-22, wherein the defendant needs the evidence to prove the defense, but he
7 must prove the defense to get the evidence. *Cf. United States v. Dorrell*, 758 F.2d
8 427 (9th Cir. 1985) (government moved in limine to exclude necessity defense;
9 defendant was required to make an in camera offer of proof, based on which the
10 Court would decide if the evidence was sufficient as a matter of law). Thus, in
11 *Dorrell*, the question of whether the defendant could establish the defense in a
12 legally sufficient manner was decided not in the attempt to procure evidence
13 supporting it, but rather in an assessment of that evidence when offered in support
14 of the claim. The Court articulated the law under which it assessed the proffered
15 evidence: "Asserting the defense requires a showing that the defendant 'act[ed] to
16 prevent "an imminent harm which no available options could similarly prevent."'"
17 In addition, the defendant must establish that he reasonably anticipated the
18 existence of a direct causal relationship between his conduct and the harm to be
19 averted." *Dorrell*, 758 F.2d at 430-31 (internal citations omitted). Both of those
20 requirements could potentially be met here, although the "no available options"
21 requirement will require evidence about the efficacy *vel non* of other possible
22 responses. Hence, information about the actual response to the activation of rescue
23
24
25
26
27
28

1 beacons is absolutely material to the preparation of the defense. This materiality is
2 confirmed by the fact that the government has already disclosed in this case a
3 document created by FWS in which Sid Slone, the Cabeza Prieta Refuge Manager,
4 argues, albeit with a paucity of evidence to support his argument, that the rescue
5 beacons are a better method for saving more lives than the distribution of water
6 (Bates no. 49).
7

8
9 The rescue beacon data may additionally be material to the RFRA defense,
10 which this Court has ordered may be asserted at trial. Doc. 79 at 3. Specifically, the
11 rescue beacon evidence may bear on whether a prosecution for driving on a
12 restricted road, or for leaving emergency supplies in the refuge, places a
13 “substantial burden” on the defendant’s exercise of his religious beliefs. If the
14 defendant’s beliefs require him to attempt to help those in dire need and save lives,
15 evidence about the failure of non-prohibited methods of doing that is highly
16 relevant to whether the prosecution substantially burdens his exercise of religion.
17
18

19
20 Further individuals have submitted FOIA requests to CBP and received no
21 response for many months. Similarly, a publicly available document released by
22 CBP on June 30, 2016 reports national data on rescue beacons, but glaringly omits
23 any data about the activation of beacons anywhere in the Tucson Sector, which
24 includes Cabeza Prieta. Indeed, this is the only sector with beacons that neglected
25 to disclose how often they had been activated, along with the numbers of rescues
26 and deaths. *See* Exhibit 4 at 3. The neighboring Yuma Sector, tellingly, reports
27
28

1 1,161 activations and only two individuals rescued. *Id.* Accordingly, this discovery
2 request is not a shot in the dark; existing information reveals substantial reason to
3 believe that the response may not be what the government claims.
4

5 Defendant has clearly established that the information sought, which the
6 government has, is material to the preparation of the defense. It “behooves the
7 government to interpret the disclosure requirement broadly and turn over whatever
8 evidence it has pertaining to the case.” *United States v. Hernandez-Meza*, 720 F.3d
9 760, 768 (9th Cir. 2013).
10

11 Finally, should the Government continue to refuse to provide this basic
12 information about its operations in this crucial area, and should this Court refuse to
13 order the obviously material information disclosed, the Government must at the very
14 least be precluded from introducing any evidence or making any argument regarding
15 the use of rescue beacons.
16
17

18 RESPECTFULLY SUBMITTED this 22nd day of January, 2019.
19

20 KUYKENDALL & ASSOCIATES

21 By /s/ Amy P. Knight

22 Gregory J. Kuykendall

23 Amy P. Knight

24 531 S Convent Avenue

25 Tucson, AZ 85701

26 Attorneys for Defendant Scott

27 Daniel Warren
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on January 22nd, 2019, I electronically transmitted a PDF version of this document to the Clerk of Court using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Nathaniel J. Walters, Esq. (email: Nathaniel.walters@usdoj.gov)
Anna R. Wright, Esq. (email: anna.wright@usdoj.gov)
United States Attorney's Office
405 W. Congress, Suite 4800
Tucson, AZ 85701